(3)

No. 05-1493

In the Supreme Court of the United States

AT&T INC. (F/K/A SBC COMMUNICATIONS INC.),
Petitioner,

v.

RLH INDUSTRIES, INC., AND
PACIFIC BELL TELEPHONE COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND VERIZON COMMUNICATIONS INC. AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia and is the world's largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community. The Chamber is well situated to brief the Court on the importance of the issues presented in the petition to companies collectively responsible for a substantial portion of total U.S. economic activity.

The question presented by this case is an important one for companies that conduct business outside California but deal (or are asked to deal) with California companies as part of a national commercial enterprise. The risks and burdens of multiple litigation for such firms are not peculiar to business competition law, but the antitrust laws pose a unique risk because they confront a firm with the prospect of treble damages liability. Also, antitrust litigation itself can inflict massive costs that are nothing more than a deadweight loss to the firm and society. The combination of potentially staggering penalties and high litigation costs often induces firms to compromise antitrust cases even when they have meritorious defenses. That result does not benefit the competitive process or consumers. It forces

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[1] The parties' letters of consent to the filing of this amicus brief have been lodged with the Clerk. Under S. Ct. R. 37.6, *amici curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity other than the *amici curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief.

successful businesses to pay unsuccessful parties for spurious claims; it encourages the filing of lawsuits as a means of leadening the saddlebags of profitable firms; and, by clogging the courts with actions that should be brought elsewhere (if they are brought at all), it delays resolution of cases by parties with meritorious claims.

Verizon Communications Inc. is one of the largest providers of telecommunications services in the United States and the world. Like other firms in this industry, Verizon operates a multistate communications network. This enterprise requires large investments and expenditures in order to provide customers in each of the 50 States with wireline, wireless, data, and (in progress) video services, to enhance the technological capabilities of its telecommunications network, and to develop new services. In this respect, Verizon's interest in appropriate, clear, and definite constitutional limitations on the application of state antitrust rules to conduct occurring outside of the forum State is similar to the interest of countless other large businesses in all sectors of the economy.

Verizon's interest differs in kind, not just in degree, however, because extensive multistate regulation of telecommunications has been a fact of life for more than 70 years. Indeed, telecommunications is one of the most heavily regulated industries in our economy, with both the federal and state governments playing complementary, but distinct, roles. The decision below by the California Court of Appeal, Fourth District, threatens to disrupt this system by imposing overlapping and potentially inconsistent state burdens of a type that the Commerce Clause of the United States Constitution was intended to eliminate. The Court of Appeal held that state antitrust liability may be imposed for actions that occur beyond the forum State's borders, that have no effect on markets or consumers within the territory of the forum State, and that even may be entirely lawful under the law of the State where the transaction occurred. Such a holding, if allowed to stand, would

burden the ability of a multistate business to compete successfully in today's economy and would damage the interests of the consumers whom such firms attempt to serve, while advancing no legitimate state interest. Verizon therefore has a substantial interest in the matter before this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

"No State can legislate except with reference to its own jurisdiction." *Bonaparte* v. *Tax Court*, 104 U.S. 592, 594 (1882). Perhaps first articulated in *Bonaparte*, the principle that each State may exercise sovereign power only within its own defined jurisdiction has become an axiom of constitutional law. That principle finds expression in decisions interpreting at least[2] three separate provisions of the United States Constitution: (a) the Commerce Clause, Art. I, § 8, Cl. 3;[3] (b) the Due Process Clause, Amend. XIV, § 1;[4] and (c) the Full Faith and Credit Clause, Art. IV, § 1.[5] The common denominator in each clause is the principle that no State may regulate the internal affairs of

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[2] Also relevant are the Privileges and Immunities Clause of Article IV, § 2, and the Privileges or Immunities Clause of Section 1 of the Fourteenth Amendment. They guarantee that each State will treat all persons within its jurisdiction in the same manner as state residents. *E.g.*, *Toomer* v. *Witsell*, 334 U.S. 385, 395-403 (1948). Those sections would be unnecessary if each State could govern its own residents wherever they may be.

[3] *See, e.g.*, *Healy* v. *The Beer Institute*, 491 U.S. 324 (1989); *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U.S. 573 (1986); *Edgar* v. *MITE Corp.*, 457 U.S. 624 (1982); *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935).

[4] *See, e.g.*, *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408 (2003); *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996).

[5] *See, e.g.*, *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985); *Allstate Ins. Co.* v. *Hague*, 449 U.S. 302 (1981); *New York Life Ins. Co.* v. *Head*, 234 U.S. 149, 161 n.1 (1914) (collecting cases).

another State, its residents, or their activities unless their conduct has a concrete effect on the former State's markets or consumers.[6] By so doing, those clauses "reflect the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres." *Healy* v. *The Beer Institute*, 491 U.S. 324, 335-336 (1989) (footnotes omitted).[7]

This case involves the Commerce Clause. Under the so-called Dormant Commerce Clause – *viz.*, an implied limitation on state authority over interstate commerce, *see, e.g.*, *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) 299 (1851); *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824) – States may not discriminate against interstate commerce, nor may they impose unreasonable burdens on it or on parties (including corporations) who engage in it. *See, e.g.*, *Granholm* v. *Heald*, 544 U.S. 460, 471 (2005). Applying that doctrine, this Court has held for more than 70 years that no State may regulate the internal affairs of another regardless of the alleged benefits of doing so. *E.g.*,

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[6] *See Edgar*, 457 U.S. at 643 ("The limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts. In either case, 'any attempt "directly" to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power.'") (quoting *Shaffer* v. *Heitner*, 433 U.S. 186, 197 (1977)); *New York Life Ins. Co.*, 234 U.S. at 161 ("[I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State and in the State of New York and there destroy freedom of contract without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. * * * The principle * * * lies at the foundation of the full faith and credit clause and the many rulings which have given effect to that clause.") (footnote omitted).

[7] It makes no difference whether the state legislature or state courts seek to extend the reach of state law. *See Healy*, 491 U.S. at 336 n.13; *Edgar*, 457 U.S. at 643; *New York Life Ins. Co.*, 234 U.S. at 162.

Healy, 491 U.S. at 324; *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935).

The California Court of Appeal disregarded that per se rule in favor of a balancing test that would weigh the alleged benefits to California of regulating conduct in (say) Texas. The Court of Appeal believed that this Court permits a balancing test to be used in cases like this one, but this Court rejected that notion in *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U.S. 573 (1986), which the court below misread. The court below envisioned no harm from its ruling, but that supposition rests on the mistaken premise that federal and state antitrust law are identical. That decision therefore threatens to destabilize the interstate comity fostered by the Dormant Commerce Clause that makes business planning possible for multistate firms.

ARGUMENT

I. THE COMMERCE CLAUSE PROHIBITS A STATE COURT FROM APPLYING THE FORUM'S SUBSTANTIVE STATE ANTITRUST LAW TO OTHER STATES' MARKETS

A. Beginning with Justice Cardozo's opinion for the Court in *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), on numerous occasions over the past 70 years this Court has held unconstitutional under the Commerce Clause the application of state law to activities occurring in a different State.[8] This

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[8] *See Healy*, 491 U.S. at 324; *Brown-Forman Distillers Corp.*, 476 U.S. at 573; *United States Brewers Ass'n* v. *Healy*, 692 F.2d 275 (2d Cir. 1982), *summarily aff'd*, 464 U.S. 909 (1983); *Edgar*, 457 U.S. at 624; *Schwegmann Brothers Giant Supermarkets* v. *Louisiana Milk Comm'n*, 365 F. Supp. 1144 (M.D. La. 1973), *summarily aff'd*, 416 U.S. 922 (1974); *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935); *see also State Farm*, 538 U.S.at 408; *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996); *Shutts*, 472 U.S. at 797 (relying on the above line of Commerce Clause decisions when construing the Due Process Clause); *Bigelow* v. *Virginia*, 421 U.S. 809, 824 (1975) ("A State does not acquire power or supervision over the internal affairs of another State merely

Court's decision in *Healy* v. *The Beer Institute*, 491 U.S. 324 (1989), is just the most recent example.[9]

In *Healy*, this Court held unconstitutional a Connecticut statute requiring liquor manufacturers to affirm that their posted prices for in-state sales did not exceed the prices offered in other States. In so ruling, the Court concluded that its prior decisions had established, "at a minimum," 491 U.S. at 336, three relevant propositions: *First*, the "Commerce Clause * * * precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Ibid.* (internal punctuation omitted). *Second*, "a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature." *Ibid.* (same). *Third*, "the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Ibid.* at 336 (same).

Applying those principles to the statute at issue, the Court held that "the Connecticut statute has the undeniable effect of controlling commercial activity occurring wholly outside the boundary of the State." 491 U.S. at 337. The "practical effect" of the Connecticut law, when considered "in conjunction with

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because the welfare and health of its own citizens may be affected when they travel to that State."); *Huntington* v. *Attrill*, 146 U.S. 657, 669 (1892) ("Laws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extraterritorial effect only by the comity of other States").

[9] Since 1989, the Court has twice reaffirmed the principles articulated in *Healy* in cases involving the Due Process Clause. *State Farm*, 538 U.S. at 421-422; *Gore*, 517 U.S. at 570-573.

the many other beer-pricing and affirmation laws that have been or might be enacted throughout the country," was pernicious, the Court concluded, because it threatened "to create just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude." *Id.*

The principles set forth in *Healy* were hardly novel. Indeed, the law could hardly be otherwise. The Framers adopted the Commerce Clause to remedy the fundamental problem occasioning the need for the Constitution itself: namely, the absence of a federal power under the Articles of Confederation to regulate commerce and prevent the economic Balkanization of the fledgling nation. The Framers saw internecine trade wars threaten to split apart the new republic as each State sought to champion its own parochial firms and interests. The Articles of Confederation were useless to stem this destructive rivalry because they contained no provision comparable to the Commerce Clause that would empower a national governing body to referee competing state claims of authority and keep the States from burdening national commerce with self-interested ordinances.[10] Realizing the need for just such a solution and seeking to cabin the centrifugal forces produced by the States'

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[10] In this respect the States operated, under the Articles of Confederation, in a manner similar to the sovereign nations in today's global economy. Matters touching on the interests of two different States could be regulated by one State or the other or both, but not by any higher (interstate) authority, just as today one or both of two different nations – but not any international competition authority – might claim the authority to regulate competitive conditions with effects in both nations. *See generally F. Hoffmann-LaRoche Ltd.* v. *Empagran S.A.*, 542 U.S. 155 (2004). Even if the "effects doctrine" might allow the application of U.S. federal antitrust law to conduct affecting U.S. exporters' efforts to do business in foreign markets – *but see* Pet. 13 (citing *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 582 & n.6 (1982)) – it would not at all follow that California is entitled to apply California antitrust law to conduct affecting California exporters' efforts to do business in Wisconsin or Texas.

self-interested regulation of trade, James Madison drafted the Commerce Clause to empower the Congress – in which all of the States were represented, U.S. Const. Art. I, § 2, Cl. 1, § 3, Cl. 1 – to accommodate their conflicting interests and to regulate interstate trade for the good of the nation. *Healy*, 491 U.S. at 335-336.[11]

B. The decision below threatens a recurrence of the very type of disharmony that the Framers sought to forestall through the Commerce Clause. That ruling would allow RLH to recover treble damages for transactions undertaken by AT&T in other States – even though those transactions had no effect on California markets or consumers, and may have been entirely lawful under the laws of the States where the transactions occurred. Those States may not analyze tying arrangements in the same way that they are treated under California law, or those States may deem the challenged conduct immune from suit under another feature of federal or state law. (That may explain why RLH chose this unusual forum for a lawsuit challenging business dealings a thousand miles away under state, not federal, law.)

For example, a different State may analyze the conduct at issue under the Filed Tariff Doctrine. That doctrine – first articulated in Justice Brandeis's opinion for this Court in *Keogh* v. *Chicago & Northwestern Ry.*, 260 U.S. 156 (1922) – prohibits a party from challenging under the antitrust laws (or any other law for that matter) the actions of a regulated utility taken in conformity with the provisions of a tariff filed with the responsible administrative agency.[12] That doctrine is fully

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[11] *See also, e.g.*, *Hughes* v. *Oklahoma*, 441 U.S. 322, 325-326 (1979); *The Federalist* Nos. 41 & 42; James Madison, *Vices of the Political System of the United States*, in 2 Writings of James Madison 362-363 (G. Hunt ed. 1901).

[12] The doctrine forbids a regulated entity to charge rates for its services, or to offer service features (such as faster delivery), other than those properly filed with the appropriate regulatory authority. By rendering a

applicable to the actions of a regulated telecommunications carrier. *AT&T* v. *Cent. Office Tel., Inc.*, 524 U.S. 214 (1998); *MCI Telecommunications Corp.* v. *AT&T*, 512 U.S. 218 (1994). The decision below thus creates the anomaly that AT&T's decisions to require use of specified high voltage protection (HVP) equipment, which were entirely lawful in the only States whose markets or consumers were affected by those decisions, nevertheless could be held unlawful by a State with no relationship to the relevant transactions, just because the plaintiff is a resident of that State. By a parity of reasoning, economic regulation of California markets would not be determined by the California legislature alone, but by the application of the economic regulatory legislation (and underlying philosophy) of each of the other 49 States, to the extent that residents of those States sought to do business in California markets. The Federal Constitution does not allow a State to impose liability in those circumstances.

It does not matter whether AT&T had complied fully with the laws of other States when it decided to mandate the use of HVP equipment other than RLH's product. As a matter of federal constitutional law – not just state choice-of-law principles – California cannot apply its antitrust law to this transaction even if AT&T violated (for example) Texas law, since the transactions in question had no effect on California's markets or consumers. *See State Farm*, 538 U.S. at 421-422; *Shutts*, 472 U.S. at 821-822. One of the virtues of a federal system is that a company like AT&T is entitled to limit its liability under any

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tariff a guarantee of only the services defined within, the doctrine also necessarily bars resort to other laws (such as state antitrust laws) as a means of supplementing those services. *E.g.*, *AT&T* v. *Cent. Office Tel., Inc.* 524 U.S. 214, 223-224 (1998); *Keogh*, 260 U.S. at 163. "The filed rate doctrine's purpose is to ensure that the filed rates are the exclusive source of the terms and conditions by which the common carrier provides to its customers the services covered by the tariff." *Cent. Office Tel.*, 524 U.S. at 230-231 (Rehnquist, C.J., concurring).

State's law by ensuring that its actions have no effect within that State. Otherwise – that is, if every business can be held liable under the law of each of the 50 States just because a plaintiff chooses to bring suit there – no business would be free from the regulation of any State that wishes to extend its reach nationwide for whatever reason. Only Congress was granted plenary authority to regulate interstate commerce, however, because only in Congress is every State afforded the representation that the Framers saw as the antidote to interstate warfare. *See S. Pac. Co.* v. *Arizona*, 325 U.S. 761, 767 n.2 (1945).

C. The Court of Appeal erred in the reasons that it gave for rejecting AT&T's Commerce Clause argument.

1. Initially, the Court of Appeal declined to apply the ruling in *Healy* to this case on two grounds: "*Healy* did not specifically consider state antitrust laws," Pet. App. 14a, and the application of California antitrust law to the challenged conduct would not pose a risk of inconsistent state law rulings "because the Sherman Act already bars tying arrangements throughout the land." *Ibid.* That is a non sequitur, for two reasons.

First: The Court of Appeal concluded without any analysis that California law and federal law are identical regarding tying arrangements. To justify that proposition, the court below cited, Pet. App. 6a, 14a, this Court's 1958 decision in *Northern Pacific Railway* v. *United States*, 356 U.S. 1 (1958), which stated that "[t]ying agreements serve hardly any purpose beyond the suppression of competition." 356 U.S. at. 6 (quoting *Standard Oil Co.* v. *United States*, 337 U.S. 293, 305-306 (1949)). But federal antitrust law has changed enormously in the near half-century since the *Northern Pacific Railway* case was decided. Today, federal law requires a far more sophisticated analysis than did *Northern Pacific Railway* of the legality of alleged tying arrangements. *See, e.g., Jefferson Parish Hosp. Dist. No. 2* v. *Hyde*, 466 U.S. 2, 25 (1984) ("There is nothing inherently anticompetitive about packaged sales."); *Grappone, Inc.* v.

Subaru of New England, 858 F.2d 792, 795 (1st Cir. 1988) (Breyer, J.) ("[T]o understand the harm that tying may cause requires a fairly subtle antitrust analysis. One cannot infer an automatic harm to the competitive process simply because a Seller refuses to sell Product A to a Buyer unless the Buyer also buys Product B. That is to say, a tie does not 'obviously' hurt a Buyer by making it take a product it does not want.").[13] Only this Term, the Court has made clear that the above statement in *Northern Pacific Railway* no longer is good law. *See Ill. Tool Works, Inc.* v. *Indep. Ink, Inc.*, 126 S. Ct. 1281, 1286-1287 (2006). Accordingly, the Court of Appeal erred in assuming the federal and California law regarding tying arrangements are identical.

Second: The question presented by this case is not whether the Commerce Clause *authorizes* Congress to reach the conduct at issue, or whether the Sherman Act *regulates* these transactions, but is whether the Commerce Clause *limits* California's exercise of its own antitrust law over that activity. An affirmative answer to the first two inquiries undercuts rather than supports the proposition that the Dormant Commerce Clause leaves room for California to regulate extraterritorially. The Commerce Clause is *both* an affirmative grant of *authority* to Congress and an implied *restraint* on the police power of the States. Unless Congress has delegated to the States the power to regulate interstate commerce, Congress's exercise of its express textual authority over that subject does not lift the implied prohibition on a State's effort to regulate directly transactions taking place in other States. Accordingly, the jurisdictional reach and the substance of federal antitrust law provide no

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[13] *See also, e.g.*, 10 Philip E. Areeda, Herbert Hovenkamp & Einer Elhauge, *Antitrust Law* ¶ 1758d1, at 330 (2d ed. 2004); Robert H. Bork, *The Antitrust Paradox* 365-381 (1978); Keith N. Hylton, *Antitrust Law: Economic Theory and Common Law Evolution* 295 & n.42, 297-302 (2003); Richard A. Posner, *Vertical Restraints and Antitrust Policy*, 72 U. Chi. L. Rev. 229, 235 (2005).

support for the authority of a State to regulate an extraterritorial transaction.

2. Construing *Raymond Motor Transport, Inc.* v. *Rice*, 434 U.S. 429 (1977), and *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), the court below made the remarkable – and quite erroneous – statement that "the commerce clause's primary concern is not geographic, but practical." Pet. App. 15a. As we have shown above, in case after case after case this Court has construed the Commerce Clause to place stringent limits on States' efforts to regulate out-of-state conduct. Paying little heed to the relevant line of cases, and focusing instead on *Raymond Motor Transport* and *Pike* v. *Bruce Church*, the court concluded that, in every case, the Commerce Clause "focuses on the balance between the state law's benefits to local commerce and its burdens upon interstate commerce, not simply on the location of the challenged conduct." Pet. App. 15a. That statement seriously misreads the Court's decisions.

Neither *Raymond Motor* nor *Pike* involved extraterritorial application of state law. In both cases, state law regulated conduct that occurred within the territory of the State involved. *Raymond Motor*, 434 U.S. at 430-435 (regulations governing the length and configuration of trucks driven within the State); *Pike*, 397 U.S. at 139-140 (order requiring that fruit grown in State be labeled as such). Neither case, therefore, addressed the very different factual scenario present here, in which a State is attempting to regulate directly transactions occurring in other States.

The Court of Appeal construed *Healy* v. *The Beer Institute* – which *did* involve a State's attempt to regulate out-of-state transactions directly – as an application of the *Pike* v. *Bruce Church* balancing test. That interpretation of *Healy* is quite wrong. The *Pike* case is not even cited in *Healy*. Moreover, *Healy* is an application of this Court's decision in *Brown-Forman Distillers Corp.*, 476 U.S. at 574. Justice Marshall's opinion for the Court in *Brown-Forman* explained that "[t]his

Court has adopted what amounts to a two-tiered approach to analyzing state regulation under the Commerce Clause." *Id.* at 578-579; *accord Healy*, 491 U.S. at 337 n.14.

The *first* tier is the one at issue in *Brown-Forman*, *Healy*, and the present case: "When a state statute directly regulates *or* discriminates against interstate commerce, * * * we have generally struck down the statute *without further inquiry*." 476 U.S. at 579 (emphasis added). The Court made it quite clear that the state statute invalidated in *Brown-Forman* fell into "the category of state regulation that is virtually *per se* invalid under the Commerce Clause," *ibid.*: "New York has 'project[ed] its legislation' into other States, and directly regulated commerce therein, in violation of *Seelig, supra*." *Id.* at 584.

It is the *second* category identified in *Brown-Forman* that is governed by the *Pike* balancing test: "When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." 476 U.S. at 579. This case does not fall into that category. There is nothing "incidental" about the effect in other States of applying California antitrust law extraterritorially to regulate the markets in those States, just as there was nothing "incidental" about the effect in other States of the statutes struck down in *Brown-Forman* and *Healy*. The Court of Appeal went seriously astray in thinking that the Commerce Clause issue in this case called for the application of a balancing test rather than the rule of "virtual[] *per se* invalid[ity]." Indeed, it would be bootless to surmise that the balancing test used in cases like *Pike* furthers the analysis in cases like this one, since *no* number or type of benefits on RLH's side can tip the scale in its favor. *See Shafer* v. *Farmers Grain Co.*, 268 U.S. 189, 202 (1925) ("[T]here can be no justification for the exercise of a power that is not possessed.").

3. From the bare fact that RLH is a California resident, the Court of Appeal concluded that this case falls within the rule stated in other cases that States may "appl[y] their antitrust laws to out-of-state conduct injuring their residents." Pet. App. 17a. But *every* authority cited for that proposition involved an injury to in-state consumers or markets, not a mere injury to a state resident wishing to export goods to another State. The distinction is vitally significant for purposes of federal constitutional law.

Antitrust law is a form of economic regulation of markets. *Town of Concord* v. *Boston Edison Co.*, 915 F.2d 17, 21 (1st Cir. 1990) (Breyer, C.J.); *see also, e.g.* Herbert Hovenkamp, *The Antitrust Enterprise* 7 (2005) ("[A]ntitrust is a form of regulation – a type of market intervention in an economy whose nucleus is private markets."); *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 263 (1983) (describing "the federal antitrust laws" as "federal regulatory statutes"). A resident of any State must expect, when it does business in California markets, to comply with all of California's economic regulatory laws, including its antitrust laws. The very constitutional principles that forbid California to regulate other States' markets likewise forbid other States to regulate California's markets. *See, e.g., Gore*, 517 U.S. at 571 (citing *Healy*) ("one State's power to impose burdens on [an] interstate market * * * is also constrained by the need to respect the interests of other States"); *id.* at 572 ("the economic penalties that a State * * * inflicts on those who transgress its laws * * * must be supported by the State's interest in protecting its own consumers and its own economy"). Among the States, California, and only California, has power to protect the State's own markets. Thus, California's power to protect its own markets by applying regulation to conduct – wherever undertaken – that affects California markets provides no support for the proposition that California may regulate the Midwestern markets at issue in this case. Rather, it proves the very point

that the *other* States whose markets are at issue have power – exclusive of California – to regulate those markets.

Likewise, the latitude California may have to protect California consumers when interstate businesses engage in transactions with those consumers provides no support for the proposition that a California company may seek to go *outside* California and try to do business elsewhere, then demand that its out-of-state would-be business partner comply with California law. Both federal law and the law of the State in which the California company attempts to do business are available to protect the California company. Notably, however, RLH has not attempted to invoke federal antitrust law or the law of any State in which the alleged tying arrangements were undertaken. It wishes, instead, to do exactly what the Commerce Clause forbids: "project[] * * * one state regulatory regime into the jurisdiction of another State." *Healy*, 491 U.S. at 337.

II. The Decision Below Will Impose A Needless Burden On Multistate Companies Doing Business In California

A. Despite the clarity and consistency with which this Court has stated the principles summarized in *Healy*, disarray persists in the lower courts. For example, in *Grant's Dairy-Maine, LLC* v. *Commissioner of Maine Department of Agriculture*, 232 F.3d 8, 19 (1st Cir. 2000), the court declined "to give credence to" what it called "the *Brown-Forman* dictum" and took the astounding position that this Court's "reference to direct regulation as a basis for invalidation" may be disregarded (at least in milk cases) because it "has not been repeated in subsequent Supreme Court cases" and does not fit within the framework of *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186 (1994). Like the court below in this case, the First Circuit took a bedrock principle of our federal system and trivialized it as one narrowly applicable to the factual context of the case in which it was announced. *See also* Pet. 18-20.

Yet most appellate courts – at least most federal appellate courts – have correctly understood that direct extraterritorial regulation is *per se* unconstitutional in a variety of factual settings. *See* Pet. 16-18 (discussing cases applying the governing constitutional principle to extraterritorial regulation of the Internet, control of solid waste, and athletic disciplinary proceedings). Perhaps most closely analogous to this case is *NCAA* v. *Miller*, 10 F.3d 633 (9th Cir. 1993), in which the court invalidated a Nevada statute that, like the proposed application of California antitrust laws in this case, attempted to protect in-state residents by direct regulation of interstate commerce. Businesses that engage in commerce with California residents thus have no idea what Commerce Clause analysis will be applied to an attempt to apply California law extraterritorially to such commerce – the Ninth Circuit's correct analysis or the incorrect analysis of the California Court of Appeal below. Given the inconsistency that has developed in the 16 years since this Court decided *Healy*, it is important for this Court to bring needed clarity to this issue. *See, e.g.*, *Martinez* v. *Court of Appeal of California, Fourth Appellate District*, 528 U.S. 152, 155 & n.2 (2000).

B. Antitrust disputes are typically complex with costly and protracted discovery and motions practice once a complaint is held sufficient.[14] The ability of an antitrust plaintiff to impose massive litigation costs on a defendant, and to seek treble

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[14] *E.g.*, 6 *Moore's Federal Practice* ¶ 26.46[1], at 26-146.24 (3d ed. 2003) ("Because of the complexity of the issues and the breadth of the discovery allowed, antitrust cases have become known as 'serpentine labyrinths' in which discovery is a 'bottomless pit.' Frequently, * * *, the large volume of material subject to discovery in antitrust cases is the result of the large amount of information that is necessary to prove the allegations of the parties.") (footnotes omitted); William W. Schwarzer, *Managing Antitrust and Other Complex Litigation* 14 (1982) ("[a]ntitrust * * * cases remain pending much longer than civil cases generally") (providing statistics).

damages, creates a powerful incentive to bring antitrust claims in the hope of coercing settlement, even if the claim does not have merit.[15]

The universally endorsed goal of the antitrust laws is the protection of consumer welfare.[16] Federal antitrust law and the laws of Nevada, Texas, Oklahoma, Missouri, Kansas, Arkansas, Indiana, Ohio, Wisconsin, Illinois, Michigan, and Connecticut are available to protect the interests of consumers in those States if in fact AT&T has done something anticompetitive. To add to AT&T's burdens, however, the possibility that its conduct might be deemed to violate California law – when no effect on California consumers or markets is alleged – would be to multiply manyfold the compliance burdens of AT&T and any other similarly situated company. These practical consequences

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[15] *E.g.*, Donald Turner, *The Durability, Relevance and Future of American Antitrust Policy*, 75 Cal. L. Rev. 797, 811 (1987) ("the mandatory treble damages rule has adverse effects, * * * encouraging baseless or trivial suits brought in hopes of coercing settlements"); Kenneth G. Elzinga & William Breit, *The Antitrust Penalties* 90-94 (1976) (availability of treble damages encourages prosecution of strike suits); Stanley J. Levy, *Discovery – Use, and Abuse, Myth and Reality*, 17 Forum 465, 468 (1982) (complex cases such as antitrust cases create more discovery and more abuse of discovery than noncomplex cases); Martin I. Kaminsky, *Proposed Federal Discovery Rules for Complex Civil Litigation*, 48 Fordham L. Rev. 907, 909 (1980) ("Nowhere is the [discovery abuse] problem more apparent and the abuse more flagrant than in complex civil litigation, particularly class actions and multiparty securities and antitrust cases.").

[16] *See, e.g.*, *Brooke Group* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) (per Kennedy, J.); *Grappone, Inc.*, 858 F.2d at 794; Robert H. Bork, *Antitrust and Monopoly: The Goals of Antitrust Policy*, 57 Amer. Econ. Rev. 242, 244 (1967); Hovenkamp, *The Antitrust Enterprise* 1 (2005); Richard Posner, *Antitrust Law* ix (2d ed. 2001).

of the decision below, in addition to its patent legal incorrectness, are strong reasons for this Court to grant review.[17]

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[17] Also relevant are the arguments of prominent antitrust scholars that it is a mistake to allow States to enforce the federal antitrust laws. Several rationales are given: States cannot materially contribute to antitrust enforcement against sophisticated wrongdoers due to inadequate resources; free-riding by States on federal efforts needlessly increases the transaction costs of enforcement actions; state antitrust enforcement is unnecessary in any field (like telecommunications) regulated by federal or state agencies; state enforcement frustrates uniform enforcement of federal law; and state enforcement actions are more likely motivated by inappropriate political considerations. A State's attempt to use its own antitrust laws to regulate transactions to which it is a bystander poses similar risks and burdens. *See, e.g.*, Richard A. Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General*, in Richard Epstein & Michael Greve, eds., *Competition Laws in Conflict* 252 (2004); Robert B. Bell, *Should the States Enforce National Mergers?*, 3 Antitrust 37 (Spring 1989); Michael DeBow, *State Antitrust Enforcement: Empirical Evidence and a Modest Reform Proposal*, in Richard Epstein & Michael Greve, eds., *Competition Laws in Conflict* 267 (2004); Michael DeBow, *Restraining State Attorneys General, Curbing Government Lawsuit Abuse*, Policy Analysis 437, 443 (May 10, 2002); Robert W. Hahn & Anne Layne-Farrar, *Federalism in Antitrust*, 26 Harv. J. L. & Pub. Pol'y 877 (2003); Robert H. Lande, *When Should States Challenge Mergers: A Proposed Federal/State Balance*, 35 N.Y. Law School L. Rev. 1047 (1990); Edward T. Swaine, *The Local Law of Global Antitrust*, 43 Wm. & Mary L. Rev. 627 (2001); David A. Zimmerman, Note, *Why State Attorneys General Should Have a Limited Role in Enforcing the Federal Antitrust Law of Mergers*, 48 Emory L.J. 337 (1999); Richard A. Posner, *Antitrust Law* 280-82 (2d ed. 2001); Richard A. Posner, *Antitrust in the New Economy*, 68 Antitrust L.J. 925, 940-41 (2001); *cf.* Roger L. Faith, Donald L. Leavens & Robert D. Tollison, *Antitrust Pork Barrel*, 25 J. of L. & Econ. 329 (1982); *see generally* Letter from R. Bruce Josten, Executive Vice-President, Government Affairs, U.S. Chamber of Commerce, to the Antitrust Modernization Comm'n, *Comments on Issues Accepted for Study* 1-6 (Nov. 11, 2005); Michael Greve, *"What They Have Done, and What They Have Failed To Do,"* 1 n.2 (John M. Olin Program in Law and Economics, University of Chicago Law School, June 18 & 19, 2004) (collecting authorities identifying competing positions).

C. But there is more. Although the complaint sought relief under California antitrust law, the limit placed by the California Court of Appeal on the reach of the Dormant Commerce Clause is not confined to such lawsuits. That decision allows damages to be sought from American businesses (or administrative penalties to be imposed, for that matter) just because the plaintiff happens to seek relief in California. Under that ruling, States could opt to apply various types of laws – such as labor or environmental laws – to transactions that cause no harm in California to its residents, businesses, and markets, regardless of where the transaction occurred. At a minimum, the decision below exposes companies like AT&T to frivolous litigation in California courts over matters that should be litigated elsewhere, if at all. The risk that such litigation could be used as a weapon for disappointed competitors and disgruntled businesses should be snuffed out before it leads to socially destructive litigation.[18]

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Each of the 50 States doubtless believes that its own antitrust laws best achieve its own chosen procompetitive goals (whatever they are) at a minimum cost (whatever hurdle they may set) while attaining a "fair and just" resolution of the matter for the parties and public (however that term is defined). But no State is entitled to have a commercial dispute adjudicated under that State's law when the conduct at issue had no effect on that State's markets or consumers. More than 150 years of Dormant

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[18] "As we know, it is not always necessary to win cases in order to blunt a rival's competitive weapons. Harassment by lawsuit or even the threat of harassment can be a marvelous stimulus to timidity on the part of competitors. The potential defendant who cannot judge in advance with any reasonable degree of certainty whether its behavior will afterward be deemed illegal is particularly vulnerable to guerrilla warfare and intimidation into the sort of gentlemanly competitive behavior that is the antithesis of true competition." William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J. of L. & Econ. 247, 254 (1985).

Commerce Clause jurisprudence makes it clear that, until Congress says otherwise, no State may dictate to the other 49 a set of nationwide commercial rules. Because the California Court of Appeal has sought to do just that, review by this Court is necessary to correct that clear legal error and prevent it from causing considerable mischief to our economy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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